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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA - SAN JOSE DIVISION

DOLORES MANDRIGUES, JUANITA
 JONES, AL F. MINYEN and WILMA R.
 MINYEN, MARK CLAUSON and
 CHRISTINA CLAUSON, individually and
 on behalf of all others similarly situated,

Plaintiffs,

v.

WORLD SAVINGS, INC., WORLD
 SAVINGS BANK, FSB, WACHOVIA
 MORTGAGE CORPORATION, and DOES
 1 through 10 inclusive,

Defendants.

CASE NO. C-07-4497 JF (RSx)

CLASS ACTION

**PLAINTIFFS' REPLY TO WORLD'S
 OBJECTIONS TO EVIDENCE SUBMITTED
 WITH PLAINTIFFS' REPLY MEMORANDUM
 IN SUPPORT OF MOTION TO COMPEL**

Hearing Date: June 18, 2008
 Time: 9:30 a.m.
 Place: Courtroom 4
 Judge: Hon. Richard Seeborg

Complaint Filed: August 30, 2007
 Trial Date: Not set yet.

1 Plaintiff submits this reply memorandum in opposition to Defendant World Savings Bank,
2 FSB'S (now known as and appearing as Wachovia Mortgage, FSB) Objections to Evidence Submitted
3 with Plaintiffs' Reply Memorandum in Support of Motion to Compel.

4
5 **Objection No. 1 - The "CBS5 Investigative Report"** (Reply at 2:22-3:15)

6 Defendant has objected to Plaintiffs citation to the CBS5 Investigative Report on the grounds
7 that it is allegedly (1) irrelevant; (2) is unfairly prejudicial; (3) lacks proper foundation; (4) it contains
8 hearsay, and (5) it violates the best evidence rule.

9 Overview: The CBS5 Investigative Report contains visual depictions of, among other things, a
10 table full of World training and instructional videos, one of which is entitled the "Blue Collar Borrower"
11 scenario. The Report also contains audio and video portions from those videos which confirm
12 Plaintiffs' allegations that World engaged in a common scheme to deceive consumers from leaning the
13 true facts, that the ARM loans sold to Plaintiffs were negative amortization loans.

14 Relevance: The cited to portions of the CBS5 Investigative Report are relevant to rebut
15 Defendant's arguments that Plaintiffs had not shown "any basis for certification" (Op. 1:8-9), and that
16 (1) Plaintiffs' "experiences are not representative of or common to the putative class," "not based on the
17 uniformity [of information] given by World to borrowers, but instead are dependent on specific
18 individualized [inquiry]." (Op. 1:23-25). Certainly, the existence of these training tapes depicting
19 World's employees training others on how to deceive and conceal from borrowers the severe
20 consequences of negative amortization is, at the very least, common evidence of Defendant's knowledge
21 and understanding of its failures to disclose and omission of material facts as alleged by Plaintiffs.
22 Because the existence of common proof of Defendant's knowledge and awareness of its failures to
23 disclose and omissions demonstrates that this issue can be determined on a class-wide basis, therefore,
24 it is directly relevant to the class certification question.

25 "Relevant evidence" is "evidence having any tendency to make the existence of any fact that is
26 of consequence to the determination of the action more probable or less probable than it would be
27 without the evidence." Fed.R.Evid. 401; United States v. Boulware (9th Cir. 2004) 384 F3d 794,
28 805—evidence need not prove anything but only must have tendency to prove fact in issue.

At the very least, the CBS5 Investigative Report demonstrates that common, class-wide, evidence is available and it also disproves or has a tendency to disprove Defendant's argument that Plaintiffs have not shown "any basis for certification" (Op. 1:8-9).

The Probative Value is Not Substantially Outweighed Unfair Prejudice: The Court in its discretion may exclude otherwise relevant evidence "if its probative value is *substantially outweighed* by the danger of unfair prejudice ..." Fed.R.Evid. 403; *Swajian v. General Motors Corp.* (1st Cir. 1990) 916 F2d 31, 34–35 – relevant evidence may only be excluded under Rule 403 when its probative value is substantially outweighed by the risk of unfair prejudice (or one of the other specified risks).

"Unfair prejudice ... means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Fed.R.Evid. 403, Adv. Comm. Notes; Old Chief v. United States (1997) 519 U.S. 172, 180, 181.

The fact that excerpts from the CBS5 Investigative Report are damaging are not enough. In fact, most evidence is "prejudicial" to the party against whom it is offered. But that is not enough to exclude it under Rule 403: Rule 403 only guards against "unfair prejudice, not prejudice per se ..." United States v. Benedetti (1st Cir. 2005) 433 F3d 111, 117–118—trials were never meant to be "antiseptic affairs" (internal quotes omitted). Moreover, "unfair prejudice" does not mean the damage to Defendant's case that results from the legitimate probative force of the evidence; rather it refers to the evidence which tends to suggest a decision on an improper basis." United States v. Winkle (6th Cir. 2007) 477 F3d 407, 417 (internal quotes omitted).

Lastly, as to Defendant's argument that the cited to portions of the CBS5 Investigative Report have "not been substantiated," (World's Obj., 1:16), lack of credibility does not itself constitute "unfair prejudice" under Rule 403. Rainey v. Conerly (4th Cir. 1992) 973 F2d 321, 325—Rule 403 does not permit exclusion of evidence simply because a judge may find it improbable.

Beyond Defendant's hollow cry of "prejudice," Defendant fails to demonstrate how the Court could possibly be prejudiced in watching the news clip of a publicly broadcasted segment on CBS5. The cited to portions of the CBS5 Investigative Report are extremely probative of the issue of the existence of common class-wide evidence to support Plaintiff class allegations, and are not outweighed

1 by any danger of unfair prejudice.

2
3 The CBS5 Investigative Report is Self-Authenticating: The CBS5 Investigative Report is
4 publically available at <http://cbs5.com/investigates> (“Bank Faces Questions Over Bay Area Home
5 Lending”) (May 20, 2008). Under Fed.R.Evid. Rule 902 (b) (6), extrinsic evidence of authenticity as a
6 condition precedent to admissibility is *not required* with respect to newspapers and periodicals. While
7 videotape excerpts of news reports are not specifically listed under Rule 902(b), the list was not
8 intended as an exclusive enumeration of the allowable methods of authentication. The Rule was
9 purposely drafted to provide flexibility and allow authentication of forms of evidence that the drafters
10 could not have anticipated. See United States v. Simpson (10th Cir. 1998) 152 F3d 1241,
11 1249—authentication of Internet “chat room” logs; United States v. Burt (7th Cir. 2007) 495 F3d 733,
12 738–740.

13 Here, Plaintiffs have offered excerpts of the CBS5 Investigative Report to show: (1) the
14 existence of World training videos concerning the negative amortization feature of the subject loans; and
15 (2) for the admissions made by World’s employees in those CD’s. In addition, the only “interviewee”
16 cited from the CBS5 Investigative Report is the portion of the video which depicts a man sitting in front
17 of, and inside his house where he states that he will likely lose his home because of World’s “Pick-A-
18 Payment” loan. Nevertheless, Defendant objects on the grounds that this homeowner lacks “personal
19 knowledge.”

20 Fed. R. Evid. 602 provides that “A witness may not testify to a matter unless evidence is
21 introduced sufficient to support a finding that the witness has personal knowledge of the matter.”
22 Certainly this homeowner knows about the facts to which he speaks because he states his personal
23 knowledge and experiences with World in the video. However, Plaintiffs only proffer this portion of the
24 Investigation Report to demonstrate that it is extremely likely that a large number of the putative class
25 who would want to be advised of this action and provided information so as to be able to contact
26 Plaintiffs’ counsel and assist in the prosecution of this action.

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28 ///

1 Defendant's Hearsay Objection:

2 1. Pictures of the World Training Videos: The visual portions of the CBS5 Investigation
3 Report depicting a table full of World Training Video's, and a close-up of the "Blue Collar Borrower"
4 scenario is not hearsay and therefore is admissible. Only the reporters narration of this portion of the
5 Investigative Report contains statements which may be subject to the hearsay rule. However, during
6 these portions, the reporter is just describing what the CD's are (World training videos) and thus, these
7 statements are admissible under Fed. R. Evid. 803(1) as present sense impressions ("A statement
8 describing or explaining an event or condition made while the declarant was perceiving the event or
9 condition, or immediately thereafter" *is not excluded by the hearsay rule regardless of whether the*
10 *declarant is available to testify.*)

11
12 2. Excerpt's of World's Training Videos: The statements made by World's employees in
13 the training videos are admissions of a party opponent and are not hearsay. An admission is an
14 out-of-court "statement ... offered against a party." Fed.R.Evid. 801(d)(2) (emphasis added). The
15 out-of-court "statement" may be written or oral or assertive conduct by (or on behalf of or imputable to)
16 an opposing party. Fed. R. Evid. 801(a).

17
18 3. Statements of World Borrower that He May Lose His Home: The cited to statements of
19 the World "Pick-A-Payment" borrower about his experience with World, that he may lose his home
20 because he was sold one the subject loans, is not being offered for the truth of the matter asserted and
21 thus is not hearsay. An out-of-court statement offered for any purpose other than to prove its truth is
22 non-hearsay. Swirsky v. Carey (9th Cir. 2004) 376 F3d 841, 852. As stated above, Plaintiffs merely
23 cited to this portion of the video to demonstrate the existence of class members who are likely to want to
24 be provided with Plaintiffs' counsels contact information so that they may learn more about the case and
25 assist in the prosecution. The statement is not offered for the truth of what this man said but rather,
26 merely to demonstrate the likelihood that there are class members who are likely to assist Plaintiff's
27 counsel in marshalling a successful class action against World. See, e.g., Pioneer Electronics (USA),
28 Inc. v. Superior Court (2007) 40 Cal.4th 360, 374.

1 Citation to the CBS5 Investigative Report Does Not Violate the Best Evidence Rule: “To
 2 prove the content of a writing, recording, or photograph, the original writing, recording or photograph is
 3 required, except as otherwise provided in these rules or by Act of Congress.” Fed. R. Evid. 1002. The
 4 purpose of the best evidence rule is to prevent inaccuracy and fraud when attempting to prove the
 5 contents of a writing. Fed. R. Evid. 1002, Adv. Comm. Notes; United States v. Ross (11th Cir. 1994) 33
 6 F.3d 1507, 1513; United States v. Holton (DC Cir. 1997) 116 F.3d 1536, 1545. The best evidence rule
 7 is an exclusionary rule (excluding secondary evidence *absent satisfactory explanation for the failure to*
 8 *produce the original*). See Fed. R. Evid. 1002, Adv. Comm. Notes.

9 Here, the CBS5 Investigative Report is publically available at <http://cbs5.com/investigates> and
 10 may be viewed in its original form by logging onto CBS5's website. Further, World's Training Videos
 11 depicted in the Investigative Report are not in Plaintiffs possession and are presumably in the possession
 12 of Defendant since it is their training videos! Because the originals of the World's video tapes are, or
 13 should be, in World's possession, Defendant's objection that Plaintiffs have not produced the originals
 14 is nonsense.

15
 16 **Objection No. 2 - Deposition Excerpts of Jon Finley** (Reply at 4:4-18)

17 Defendant objects to the cited to excerpts of the deposition transcript of Jon Finley, Reyes v.
 18 Downey Savings and Loan Assn., F.A, et al. on the grounds that his testimony is allegedly (1) irrelevant;
 19 (2) unfairly prejudicial; and (3) lack proper foundation.

20 Overview: Defendant argued in its opposition “that the only borrowers with Pick-A-Pay
 21 ARMs who are at risk of, or are in, foreclosure are those who have failed to make payments on their
 22 mortgage – typically because they have lost their job or suffered a pay cut – not because they received
 23 inadequate disclosure about their loan.” Op., 5, fn 4. Defendant then attacks two of the named
 24 Plaintiffs and attaches the Declaration of Lisa Beens in alleged support, which is nothing more than
 25 attempt to blame the victims. Moreover, notwithstanding that post contract formation conduct is
 26 completely irrelevant to Plaintiffs TILA and Fraudulent Omissions claims, Plaintiffs proffered the
 27 testimony of Jon Finley, a mortgage broker for Homefield Financial, who was trained by World
 28 (weekly) and who has personally sold World's Pick-A-Pay ARM Loans.

1 Relevance: The testimony of Jon Finley is relevant as it either proves or has a tendency to
2 prove that the cause of the wave of foreclosures is because: (1) Defendant failed to disclose important
3 material information to borrowers, prior to entering into the loans; and (2) to the extent that post
4 formation conduct is relevant, the primary cause for borrowers difficulty in keeping up with their legal
5 obligations (payments of both principal and interest), is primarily due to Defendant's own underwriting
6 guidelines (or lack thereof). Moreover, World's "*loosest*" underwriting "guidelines," which did not
7 have a credit score requirement and are primarily based on the equity borrowers had in their homes, was
8 the genesis, if not the primary cause of borrowers post formation failure to keep up with their payments.

9 The cited to portions of the deposition excerpts of Jon Finley about World's underwriting
10 guidelines (or lack thereof) are therefore directly relevant to rebut World's attempt to blame the victims
11 of its deceptive practices.

12
13 The Probative Value of the Testimony is Not Substantially Outweighed By Unfair Prejudice:

14 As stated above, "unfair prejudice" does not mean the damage to Defendant's case that results
15 from the legitimate probative force of the evidence.." United States v. Winkle, 477 F3d at 417. The
16 probative value, which tends to show or negates Defendant's attack on World's borrowers post
17 formation conduct, is not outweighed merely because it damages the credibility of Defendant's
18 arguments. While this case primarily concerns Defendant's failures to disclose and omissions of
19 material fact during the contract formation stage, as demonstrated by Defendant's opposition and the
20 Declaration of Lisa Beens, Defendant has, and is likely to attempt to interject borrowers post formation
21 conduct as a defense to class certification.

22 Moreover, Plaintiffs have objected to portions of Defendant's opposition and the Declaration
23 of Lisa Beens on the grounds that borrowers post formation conduct is (1) completely irrelevant to the
24 issue of Defendant's failure to disclose and omission of material facts *prior to* borrowers entering into
25 the loans; (2) are inadmissible hearsay; and (3) violates the best evidence rule since Defendant neither
26 proffered the originals or copies of the records upon which the arguments and statements were allegedly
27 based. Nor has there been any explanation, let alone a *satisfactory explanation*, for Defendant's failure
28 to produce these documents.

1 Thus, to the extent that the Court permits Defendant to make such arguments and introduce
2 “evidence” of borrowers post formation conduct, the highly probative value of the genesis, if not the
3 cause, for borrowers getting put into the World “Pick-A-Pay” loan is not outweighed by any perceived
4 unfair prejudice that could result from the introduction of this testimony.

5
6 Sufficient Foundation for the Admission of Jon Finley’s Testimony has been Provided:

7 Jon Finley worked for Homefield Financial in 2004. Finley Dep. Tr. 5:12-19, Arbogast Decl.
8 Exh. 3. Mr. Finley testified about his personal knowledge of lending guidelines of Indymac,
9 Countrywide, First Franklin, and Homefield Financial. *Id.* at 57:6-21. He also testified about the
10 weekly training he received from World during 2004 while he worked for Homefield.

11
12 Q: Did you receive any training specifically to World option ARM loans as opposed to
13 Downey option ARM loans?

14 A: **There was a World account representative that came by once a week** and she would,
15 you know, help us, you know, with the things. But we would go to them if we couldn’t
16 get approved anywhere else. It was usually a call. “This is what I have, do you think you
17 can do this loan,” and they would call and tell us.

18 Q: **And World actually had an account representative come to your guys’ office on a**
19 **weekly basis?**

20 A: **Correct.**

21 See Finley Dep. Tr. 85:16-86:3, Arbogast Decl. Exh. 3.

22 Under Rule 602, “[a] witness may not testify to a matter unless evidence is introduced
23 sufficient to support a finding that the witness has personal knowledge of the matter.” In addition, Rule
24 701, lay witnesses may give opinion testimony if it is “rationally based on the perception of the
25 witness.”

26 Here, the above referenced deposition excerpts demonstrate Mr. Finley’s personal knowledge
27 through his dealings with Defendant. Fed. R. Evid. 602; United States v. Lake (3rd Cir. 1998) 150 F.3d
28 269, 273 (“A witness’ personal knowledge of a matter may be shown by any admissible evidence,

1 including the witness' own testimony.) Mr. Finley's statements are therefore admissible because they
 2 are based upon what he actually observed or perceived through his or her own senses.

3 In its objections, Defendant apparently argues that Mr. Finley's testimony about what he
 4 personally observed and knew about World's lending practices can only be admitted through expert
 5 testimony. See World's Obj., 3:1-3 ("Plaintiffs offer no evidence about Mr. Finley's identity,
 6 background, or credentials.")

7 Experts who possess certain qualifications and knowledge may give opinion testimony not
 8 based on personal knowledge. Fed. R. Evid. 702, 703; see also United States v. de Soto (7th Cir. 1989)
 9 885 F.2d 354, 361 (officer's testimony on drug dealers' "countersurveillance techniques" was based on
 10 special knowledge and experience). Thus, because Mr. Finley's testimony is based upon his own
 11 perceptions and experiences with World, the Court need not qualify him as an expert to admit his
 12 testimony. Nevertheless, if disputed, the foundational facts required for admissibility of expert opinion
 13 testimony (e.g., witness' specialized knowledge, skill, experience, etc.) must be determined by the court.
 14 See Fed. R. Evid. 104(a); Daubert v. Merrell Dow Pharmaceuticals, Inc. (1993) 509 US 579, 593. If the
 15 witness is shown to have specialized knowledge that will assist the trier of fact, it is an abuse of
 16 discretion to exclude the expert's testimony simply because he or she is not the "best" qualified person.
 17 ***The degree of expertise or knowledge goes to the weight of the testimony rather than its admissibility.***
 18 Holbrook v. Lykes Bros. S.S. Co. (3rd Cir. 1996) 80 F.3d 777, 782; McCulloch v. H.B. Fuller Co. (2nd
 19 Cir. 1995) 61 F.3d 1038, 1043; Huval v. Offshore Pipelines, Inc. (5th Cir. 1996) 86 F.3d 454, 457-458.

20 Here, the submitted deposition excerpts identify Mr. Finley, by name and as a former
 21 employee of Homefield Financial, ***who received weekly training from World about its underwriting***
 22 ***guidelines***, and regularly sold World option ARM loans during the liability period, August 29, 2003 to
 23 the present.

24 Thus, Mr. Finley's testimony should be admitted and the Court can place whatever weight it
 25 deems appropriate to his testimony.

26 ///

27 ///

28 ///

CONCLUSION

Plaintiffs respectfully request that the Court overrule the cited to portions of the CBS5 Investigative Report, and deposition excerpts of the testimony of Jon Finley.

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